

Appeal from decision of Director, Bureau of Land Management, rejecting application ES 6794 for cash payment in satisfaction of alleged railroad lieu selection rights.

Affirmed.

Res Judicata

Where the Department has acted within its jurisdiction and review of such action has not been sought on a timely basis, the principle of res judicata in its administrative law counterpart – the doctrine of finality of administrative action – is operative to bar a claim for relief.

Railroad Grant Lands

A railroad land grant confers no right to specific lands within the indemnity lands until the grantee's right of selection has been exercised.

Railroad Grant Lands

A railroad company acquires no title to indemnity lands prior to the exercise of its right of selection, and a purported sale of unselected land within the indemnity limits of a railroad land grant is without effect except as it may operate as a promise to sell or an assignment of the benefits which will accrue when the right to select has been exercised.

Railroad Grant Lands

A transfer of a railroad company's to unselected indemnity lands is not a sale of land within the meaning of the saving clause of section 321(b) of the Transportation Act of 1940 under which a patent may be issued for the benefit of an innocent purchaser for value.

Railroad Grant Lands—Scrip: Payment in Satisfaction

An application filed pursuant to the Act of August 31, 1964 – by which an applicant seeks to receive cash payment in satisfaction of an asserted unexercised railroad lieu selection right – is properly rejected where the basis for the claim was extinguished when the railroad filed a release of all its indemnity lands pursuant to section 321(b) of the Transportation Act of 1940.

APPEARANCES: Thomas J. Trimble, Esq., of Jennings, Strouss, and Salmon, Phoenix, Arizona, for appellant.

OPINION BY MR. GOSS

L. M. Perrin, Jr., and Perrin Properties, Inc., by Jack L. Klaverweiden, attorney in fact, have appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management, dated March 5, 1971, which rejected a cash election application (ES 6794) filed pursuant to the Act of August 31, 1964 (78 Stat. 751), and regulation 43 CFR 2612.4 (1972), formerly 43 CFR 2221.2-3 (1969). The election was filed for 21,454 acres of claimed unsatisfied "railroad lieu selection rights under the Transportation Act of September 18, 1940." [54 Stat. 954, 49 U.S.C. § 65(b) (1970)].

The Klaverweiden application is apparently based on a claim for indemnity lands pursuant to various contracts executed between March 10, 1894, and January 1, 1897, by E. B. Perrin, R. Perrin and the Atlantic and Pacific Railroad Company for the sale of lands within the land grant to the railroad company under the Act of July 27, 1886 (14 Stat. 292). ^{1/} Under this Act, to aid in the construction of the railroad, Congress granted the Atlantic and Pacific every odd-numbered section of land in a strip 40 miles wide on either side of the road. This Act also gave the company a right to indemnify itself for losses in these lands occasioned by appropriation of settlers, by selecting replacement lands from odd-numbered sections within a strip 10 miles wide outside of each of the 40-mile strips.

^{1/} Appellants' application refers to "Railroad lieu selection" and attaches a three-page list of lands designated as sales by the Santa Fe Pacific Railroad Company, or its predecessor, the Atlantic and Pacific Railroad Company, prior to September 18, 1940. Appellants have underlined in red on this list specific sales to E. B. Perrin and R. Perrin, dated March 10, 1894, and October 15, 1896. They also submit a copy of a contract dated July 1, 1887, between the Atlantic and Pacific and E. B. Perrin.

The Santa Fe Pacific Railroad Company subsequently acquired the interests of the Atlantic and Pacific Railroad Company at a foreclosure sale and became the owner of the land grant of that company under the Act of March 3, 1897 (29 Stat. 622). On December 18, 1940, the Santa Fe Pacific voluntarily relinquished all claims arising out of any land grant to itself or its predecessor in interest pursuant to the provisions of section 321(b) of the Transportation Act of 1940, supra. ^{2/}

The Bureau in rejecting appellants' application found no basis for claim to indemnity land stating:

Even if the contract authorized such a selection right, this right expired and was terminated on December 18, 1940, when the Santa Fe Pacific Railroad executed a release under the Transportation Act of 1940, supra. This was made clear in Departmental decision Atlantic and Pacific Railroad Company, A-23630 (February 8, 1944) [58 I.D. 577]. Furthermore, the courts have held in similar cases that the holder of an appointment as attorney in fact has no further selection rights, when the principal's rights have been terminated. See Udall v. Battle Mountain Co., 385 F.2d 90 (1967), [cert den. 390 U.S. 957 (1968)]; United States v. Santa Fe Railroad, Donald M. Wheeler, et al., Civil No. 64-1430, U.S.D.C., Central District of California (December 16, 1968).

Additionally, the Bureau found that the appellants had not recorded a claim for scrip or selection rights as required by the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. § 274, note (1970), and therefore they are barred from the acquisition of land or from the cash redemption provided by the 1964 Act.

While appellants challenge the Bureau's decision, they submit little basis for their denial of the crux of the rejection, i.e.,

^{2/} Section 321(b) of the Transportation Act provides that if any land grant railroad wishes to take advantage of charging higher rates for carrying Government traffic, it must file a release of any claim it might have against the United States to lands granted to the railroad. It is provided, however, that nothing in section 321(b) should be construed:

* * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *

the expiration of the alleged selection right when the Santa Fe Pacific Railroad filed its release under the Transportation Act of 1940. Instead, they focus the appeal on the constitutionality of the recording act of 1955 and the inapplicability of this act to their type of claim. They contend that (1) the recording act of 1955 does not circumscribe the applicants' rights when the Government was in fact informed of applicants' claim, (2) the application of the recording act to these applicants is an unconstitutional taking of their property without due process of law because no notice of the statute was given to them, and (3) the application of the recording act to the applicants is an unconstitutional taking of property without just compensation.

In Atlantic and Pacific Railroad Co., et al., supra, the Department previously considered and rejected the same basis for a railroad grantee's claim of right to select indemnity lands. In that case the railroad's application for a patent under the Transportation Act of 1940, *supra*, was rejected for 3,014.5 acres of land in Yavapai County, Arizona, a portion of the same lands as applied for in the case herein concerned. ^{3/} As to the lands included in the 1944 decision, it is not appropriate to reopen consideration of that determination. It is well established that where the Department has acted within its jurisdiction, and review of such action has not been sought on a timely basis, the principle of *res judicata* – in its administrative law counterpart, the doctrine of finality of administrative action – is operative to bar a claim for relief. Gabbs Exploration Co., 67 I.D. 160 (1960), *aff'd* in Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963), *cert. den.* 375 U.S. 822 (1963).

As to the lands not involved in the prior application, that application nevertheless involved the same asserted contract right of E. B. Perrin for indemnity lands within the grant to the Atlantic and Pacific Railroad Company. Section 321(b) of the Transportation Act of 1940 specifies that nothing in the section should be construed to prevent issuance of patents confirming title to lands previously sold by a carrier to an innocent purchaser for value. In construing the nature of a selection right, it has been held that the right to select additional sections of land to replace losses of land specifically granted becomes an estate in land only when the right to select indemnity land has been exercised. United States v. Anderson, 194 U.S. 394 (1904); Payne v. Central Pacific Ry. Co., 255 U.S. 228 (1921); Atlantic and Pacific Railroad Company, supra. The courts

^{3/} Appellants' selection list of 21,454 acres includes 3,014.5 acres located in Secs. 3, 5, 7, 9, and 11, T. 17 N., R 9 W., G. & S.R.M., Arizona, which were the subject of the Department's rejection of their predecessor's applications in 1944.

have consistently held that a grantee has no estate in indemnity land prior to his selection of specific sections of such land.

The right of the grantee in indemnity lands prior to selection has also been described as "only a float" which attaches to no specific lands until the selection is actually made [Ryan v. Railroad Company, 99 U.S. 382, 386 (1878); Cedar Rapids, etc., Railroad v. Herring, 110 U.S. 27, 39 (1884)] and as a right to no land capable of identification by any principles of law or rules of measurement [Kansas Pacific Railroad Company v. Atchison, Topeka & Santa Fe Railroad Company, 112 U.S. 414, 421 (1884)].

Because indemnity lands are incapable of identification until selection is made and approved, they remain the property of the United States. It is true that the Government is bound by its promise to give its grantee indemnity lands in lieu of those specifically granted, but that promise passes no legal title, and, until it is executed, creates in the grantee no legal interest in land entitled to recognition or protection. Wisconsin Railroad Co. v. Price County, 133 U.S. 496, 512 (1890); Southern Pacific Railroad Company, 53 I.D. 211, 213 (1930).

In the case on appeal the railroad's right to select the designated indemnity lands was not exercised prior to the Santa Fe Pacific's filing of releases under the Transportation Act. It was held in Atlantic and Pacific Railroad, *supra*, at 587 that the Santa Fe Pacific Railroad Company, successor to the Atlantic and Pacific, had relinquished all its rights to unselected indemnity lands when, on December 18, 1940, it filed a release pursuant to section 321(b) of the Transportation Act:

* * * This release, in harmony with the provisions of section 321(b), did not except or purport to except inchoate rights to land. The language of the release and of the statute makes this very clear. Both refer to "lands" sold, selected or patented. There is no mention of any unperfected right to acquire land. It follows that by filing its release, the Santa Fe Company relinquished its inchoate right to select indemnity land although in the absence of such release the United States could not have disposed of the land in derogation of the company's rights. The fact that the company had previously attempted to convey the land for which it now seeks a patent is immaterial since it had no title to the land and could convey none. At most the company effected nothing more than a promise to sell or an assignment of the benefits to accrue from the exercise of its selection right. There was no

sale of land to an innocent purchaser and the company cannot claim the advantage of such procedure to avoid the consequences of the release * * *.

See also Atlantic and Pacific Railroad Co., Santa Fe Pacific Railroad Co., and Aztec Land and Cattle Co., Ltd., 58 I.D. 588 (1944); Santa Fe Pacific Railroad Company, 58 I.D. 591 (1944); Santa Fe Pacific Railroad Company, 58 I.D. 596, 601 (1944). This construction of the effect of releases under the 1940 Act was subsequently termed "clearly right" by the Supreme Court in Krug v. Santa Fe Railroad Company, 329 U.S. 591, 597 (1947), which affirmed Santa Fe Pacific Railroad Company, 58 I.D. 596 (1944), supra. Accordingly, the basis for appellants' claim to the railroad's unexercised right to select indemnity land was extinguished with the filing of the railroad's release in 1940. There is no longer a recognizable claim in the nature of a scrip right which appellant can submit for cash payment from the Government.

In view of our finding of no existing lieu selection right, appellants' challenge to the validity of the recording act of 1955 is not material. We note, however, that even if some latent scrip right were discernible, failure to record under the Act of August 5, 1955, supra, 4/ would bar redemption under the Act of August 31, 1964, supra. M. B. Waldron, A-28703 (January 31, 1962); Patricia R. Williams, A-28160 (February 2, 1960); Warren A. Taylor, A-27702 (November 5, 1958). As to constitutionality, this Board is not the proper forum to pass upon the constitutionality of a statute enacted by Congress. Masonic Homes of California, 78 I.D. 312, 316 (1971); Lester J. Gendron, 6 IBLA 288 (1972).

Appellants further cite the inequities of their position if some relief is not granted by this Board. They state that they will be deprived of the property for which their predecessor in interest paid a sum of not less than \$165,083.32. The Department determined in 1914 in connection with these same Perrin contracts, that Perrin's remedy, if any, on these contracts was to be sought in a court of competent jurisdiction and not before the Department. See Perrin v. Santa Fe Pacific R.R. Co., 43 L.D. 467 (1914).

4/ Section 4 of the Act of August 5, 1955, provides:

[Failure to present for recordation]. Claims or holdings not presented for recordation, as prescribed herein, shall not thereafter be accepted by the Secretary of the Interior for recordation or as a basis for the acquisition of lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss, Member

We concur.

Douglas E. Henriques, Member

Martin Ritvo, Member

